

Brasfield & Gorrie, Inc. and International Union of Operating Engineers, Local 926. Case 10-CA-25603

July 8, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On November 14, 1991, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 10-RC-14104. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On June 8, 1992, the General Counsel filed a motion to transfer case to and continue proceeding before the Board and for summary judgment. On June 10, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of the underlying unit determination and on the basis of the Board's voter eligibility formula.¹ All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any

¹ Relying on the formula established in the Board's decision in *S. K. Whitty & Co.*, 304 NLRB 776 (1991), the Respondent, on September 20, 1991, moved the Regional Director to revoke the Union's certification and vacate the results of the election. On September 25, 1991, the Regional Director denied the motion. The Respondent's request for review of that denial was granted on February 27, 1992, and the matter remanded to the Regional Director to determine eligibility under the *Whitty* formula. On March 27, 1992, the Regional Director issued a Supplemental Decision and Order affirming certification. The Regional Director found that in the circumstances of the unit in question, use of the *Whitty* formula would not have affected the results of the election.

representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation with an office and place of business in Atlanta, Georgia, where it is engaged in construction. During the past calendar year, which period is representative of all times material herein, the Respondent purchased and received at its Atlanta, Georgia facilities material and supplies valued in excess of \$50,000 directly from suppliers located outside the State of Georgia. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held September 6, 1991, the Union was certified on September 18, 1991, as the collective-bargaining representative of the employees in the following appropriate unit:

All operating engineers, mechanics, and mechanic helpers employed by the Respondent in the Atlanta, Georgia metropolitan statistical area, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since September 23, 1991, the Union has requested the Respondent to bargain and since September 23, 1991, the Respondent has refused. We find that these refusals constitute unlawful refusals to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after September 23, 1991, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Brasfield & Gorrie, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union of Operating Engineers, Local 926, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All operating engineers, mechanics, and mechanic helpers employed by the Respondent in the Atlanta, Georgia metropolitan statistical area, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Atlanta, Georgia, copies of the attached notice marked "Appendix."² Copies of

the notice, on forms provided by the Regional Director for Region 10 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union of Operating Engineers, Local 926, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All operating engineers, mechanics, and mechanic helpers employed by the Employer in the Atlanta, Georgia metropolitan statistical area, excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

BRASFIELD & GORRIE, INC.

²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the